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Sofia bt Yusof (trading under the name and style of Warisan Prestasi Resources) v PV Power Engineering Sdn Bhd

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HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-8–01 OF 2020
WONG MEE LING JC
31 OCTOBER 2023

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Contract — Illegality — Void contract — Plaintiff and defendant entered into agreement for former to be paid for using her influence to secure government project for defendant — Defendant had separately tendered for project — Believing plaintiff's influence was responsible for tender being successful, defendant paid plaintiff RM2.4m under the agreement — Plaintiff sued for balance still owing — Defendant contended agreement was illegal and void ab initio for being contrary to public policy and sought refund of the RM2.4m — Whether agreement was illegal and void ab initio under s 24(e) of Contracts Act 1950 — Whether defendant was entitled to restitution of the RM2.4m

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The plaintiff had entered into an agreement with the defendant under which she had agreed to use her influence to secure for the defendant a multi-million ringgit contract from the Minister of Education for the upgrading of science laboratories in secondary schools in Johor ('the project'). Although the defendant had submitted a tender for the project and was subsequently awarded the same, it believed that the award was made possible by the plaintiff's efforts and, in consideration for her services, the defendant paid the plaintiff RM2,424,687 under the agreement. In the instant suit, the plaintiff claimed for an unpaid balance of monies for services rendered. The plaintiff contended that since the defendant had secured the project through her efforts, she was justified in receiving full payment for her services under the agreement. In its defence and counterclaim, the defendant contended that the agreement was illegal and void ab initio for contravening public policy and that the plaintiff should accordingly return to it the sum of RM2,424,687. The plaintiff's claim was struck out when she failed to comply with the court's order to deposit RM30,000 as security with the court or in the client's account of her lawyer. The trial then proceeded to determine the defendant's counterclaim.

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Held, allowing the defendant's counterclaim with interest and costs, declaring the agreement between the parties as invalid and/or void and/or illegal and unenforceable for being opposed to public policy and ordering the plaintiff to return to the defendant within 30 days the RM2,424,687 she had received under the agreement:

(1) The Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 held that 'it is contrary to Malaysian public policy that a person be hired for money or valuable consideration to use his position and interest to procure a benefit from the Government, as the sale of influence engenders corruption and undermines public confidence in the Government, which is inimical to public interest'. In the instant case, the plaintiff brazenly represented that only through her influence and touting could the government project be secured for the defendant and that the mere submission of a tender by the defendant was insufficient to clinch it. Applying the principle enunciated in *Merong Mahawangsa*, it was plain and obvious from the facts and evidence that the consideration for the agreement entered into by the parties herein was unlawful for being opposed to public policy under para s 24(e) of the Contracts Act 1950 and was therefore void. If the plaintiff's claim had gone for trial, it would have been dismissed on that ground alone (see paras 54, 65 & 80–81).

(2) The defendant had proven its counterclaim on balance of probabilities. As the consideration for the agreement was unlawful and the agreement was void ab initio and the plaintiff had been unjustly enriched by the payment of the RM2,424,687, the defendant was entitled to obtain restitution of the said sum (see paras 82–83).

(3) The court took the view that the defendant would be severely prejudiced if its claim for restitution was denied. It was in the public interest that the defendant was granted restitution of the monies it had paid the plaintiff not knowing at that point of time that the agreement was illegal in nature. To deny the defendant's claim would be a disproportionate response to the illegality at hand and if the bargain between the parties was upheld, it would be tantamount to encouraging dishonesty (see para 80).

[Bahasa Malaysia summary

Plaintif telah memeterai perjanjian dengan defendan di mana beliau telah bersetuju menggunakan pengaruhnya untuk mendapatkan kontrak bernilai jutaan ringgit dengan Menteri Pendidikan untuk menaiktaraf makmal sains di sekolah menengah di Johor ('projek tersebut'). Walaupun defendan telah mengemukakan tender untuk projek tersebut dan kemudiannya diberikan tender tersebut, adalah dipercayai bahawa tender itu diperoleh adalah hasil daripada usaha plaintif dan sebagai balasan kepada perkhidmatannya, defendan membayar plaintif sebanyak RM2,424,687 menurut perjanjian itu. Dalam saman ini, plaintif menuntut baki wang yang belum dibayar untuk perkhidmatan yang diberikan. Plaintif berhujah bahawa memandangkan defendan telah memperoleh projek itu melalui usahanya, beliau sepatutnya menerima bayaran penuh bagi perkhidmatannya di bawah perjanjian itu. Dalam pembelaan dan tuntutan balasnya, defendan berhujah bahawa

perjanjian itu tidak sah dan terbatal kerana melanggar dasar awam dan plaintif sewajarnya memulangkan jumlah sebanyak RM2,424,687. Tuntutan plaintif ditolak kerana gagal mematuhi perintah mahkamah untuk memasukkan wang RM30,000 sebagai jaminan kepada mahkamah atau ke dalam akaun anak guam peguamnya. Perbicaraan kemudian diteruskan untuk tuntutan balas defendan.

Diputuskan, membenarkan tuntutan balas defendan dengan faedah dan kos, mengisytiharkan perjanjian antara pihak-pihak sebagai salah dan/atau terbatal dan/atau tidak sah dan tidak boleh dilaksanakan kerana bertentangan dengan dasar awam dan memerintahkan plaintif untuk memulangkan jumlah sebanyak RM2,424,687 yang diterima di bawah perjanjian tersebut kepada defendan dalam tempoh 30 hari:

(1) Mahkamah Persekutuan di dalam kes *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 memutuskan bahawa 'ianya bertentangan dengan dasar awam Malaysia untuk seseorang itu diupah untuk wang atau balasan berharga untuk menggunakan kedudukan dan kepentingannya untuk mendapatkan manfaat daripada Kerajaan, kerana penjualan pengaruh menyumbang kepada rasuah dan menjejaskan keyakinan orang ramai terhadap Kerajaan, yang mana ianya tidak beretika untuk kepentingan awam'. Dalam kes ini, plaintif secara terang-terangan menyatakan bahawa hanya melalui pengaruh dan toutingnya, projek kerajaan itu boleh diperoleh untuk defendan dan tidak boleh diperoleh dengan penyerahan tender tender oleh defendan. Menggunakan prinsip di dalam kes *Merong Mahawangsa*, adalah jelas dari segi fakta dan keterangan bahawa balasan untuk perjanjian yang dimeterai oleh pihak-pihak di sini adalah menyalahi undang-undang kerana bertentangan dengan dasar awam menurut perenggan 24(e) Akta Kontrak 1950 dan oleh itu, tidak sah. Sekiranya tuntutan plaintif dibicarakan, ianya boleh ditolak atas alasan tersebut sahaja (lihat perenggan 54, 65 & 80–81).

(2) Defendan telah membuktikan tuntutan balasnya di atas imbangan kebarangkalian. Oleh kerana balasan bagi perjanjian itu menyalahi undang-undang dan perjanjian itu terbatal dan plaintif telah diperkayakan secara tidak adil dengan pembayaran sebanyak RM2,424,687, defendan berhak mendapatkan jumlah tersebut kembali (lihat perenggan 82–83).

(3) Mahkamah berpendapat bahawa defendan akan diprejudiskan sekiranya tuntutannya untuk pengembalian jumlah tersebut ditolak. Ianya harus demi kepentingan awam bahawa defendan dikembalikan wang yang telah dibayar kepada plaintif memandangkan beliau tidak mengetahui pada masa itu perjanjian itu adalah tidak sah. Untuk menafikan tuntutan defendan akan menyebabkan tindakan menjadi tidak seimbang

memandangkan terdapat ketidakesahan dan jika perjanjian itu dibenarkan, ianya juga akan menggalakkan ketidakjujuran (lihat perenggan 80).]

Cases referred to

Ahmad bin Udoh & Anor v Ng Aik Chong [1970] 1 MLJ 82, FC (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)
China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1, CA (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Hong Leong Singapore Finance v United Overseas Bank [2007] 1 SLR (R) 292, HC (refd)
John Ambrose v Peter Anthony & Anor [2017] 4 MLJ 374, CA (refd)
Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141; [2019] 1 CLJ 183, FC (folld)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (folld)
Pang Mun Chung & Anor v Cheong Huey Charn [2018] 4 MLJ 594; [2018] 8 CLJ 663, CA (folld)
Patel v Mirza [2017] AC 467, SC (folld)
Rowland v Divall [1923] 2 KB 500, CA (refd)
Soh Eng Keng v Lim Chin Wah [1979] 2 MLJ 91 (refd)
Subramaniam v Retnam [1966] 1 MLJ 172 (folld)
Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals [2018] 3 MLJ 141, FC (refd)
Wong Yee Boon v Gainvest Builders (M) Sdn Bhd [2020] 3 MLJ 571, FC (refd)
Yogananthy a/p AS Thambaiya v Harta Pusaka Idris bin Osman [2020] 5 MLJ 455; [2020] 6 CLJ 151, FC (refd)

Legislation referred to

Contracts Act 1950 ss 2(d), 24(e), 66
Evidence Act 1950 ss 101, 102, 103

Nur Khairunnisa bt Mohd Rosni (Ramli, Shahrir & Tajul) for the plaintiff.
Adi Radlan bin Abdul Rahman (Adi Radlan & Co) for the defendant.

Wong Mee Ling JC:

INTRODUCTION

[1] The plaintiff filed her writ and statement of claim (encl 1) against the defendant claiming the balance payment for services rendered by the plaintiff to the defendant.

[2] The defendant filed its defence and counterclaim (encl 120) against the plaintiff on the grounds of illegality of the agreement against public policy and/or that the plaintiff did not provide her services in full.

[3] On 14 February 2022, the plaintiff's claim was struck off with costs upon failure to deposit security of RM30,000 in court or to the plaintiff's counsel client's account within 21 days from the order dated 14 February 2022 (see encl 169).

[4] The trial was conducted from 29–30 January 2023 pertaining to the counterclaim filed by the defendant.

[5] After full trial and after considering all the evidence, exhs presented during the trial and submissions by the parties, the court allowed the counterclaim of the defendant as in encl 120 as follows:

(a) the written agreement between the plaintiff and the defendant dated 21 November 2017 is declared invalid and/or void and/or illegal for being opposed to public policy and cannot be enforced;

(b) the sum of RM2,424,687 received by the plaintiff from the defendant in relation to the illegal contract, to be returned to the defendant within 30 days from the date of the judgment dated 7 May 2023;

(c) interest at 5% pa to accrue on the said amount of RM2,424,687 until full settlement of the debt; and

(d) costs of RM5,000 subjected to allocator fee, to be paid by plaintiff to the defendant.

[6] The plaintiff, dissatisfied with the decision of this court, have filed an appeal against the decision.

[7] My reasons are as below.

BACKGROUND FACTS

[8] The plaintiff (t/a Warisan Prestasi Resources) and the defendant entered into the agreement on 21 November 2017 whereby the plaintiff shall provide to the defendant her services 'in securing from the Education Minister a contract from *Kementerian Pendidikan Malaysia*' for a project to 'menaiktaraf dan membaikpulih makmal sains Sekolah Menengah sebagai persediaan perlaksanaan peperiksaan amali sains untuk calon peperiksaan SPM Sekolah-Sekolah Kementerian Pendidikan Malaysia' at Johor Darul Takzim' ('the said agreement').

[9] Under the said agreement, the parties have agreed as follows:

(a) 50% of the remaining balance shall be paid by the defendant to the plaintiff upon the former receiving the first payment (see cl 2b(i));

(b) the other 50% remaining balance shall be paid by the defendant to the plaintiff upon the former receiving the second payment (see cl 2b(ii));

(c) if the plaintiff is unable to secure the award of that contract by the Education Minister, the defendant shall not be liable to the plaintiff in any manner whatsoever (see cl 5);

(d) neither party shall assign their respective rights under it without the prior written consent of the other (see cl 10);

(e) any demand under it shall be in writing (see cl 11);

(f) it shall be governed by the laws of Malaysia (see cl 13); and

(g) it shall take effect from 21 November 2017 (see cl 14).

[10] The defendant has paid the plaintiff 15% of the total value of the said agreement by first depositing with the defendant's solicitors RM1m being part payment of that 15% in two equal instalments pursuant to cl 2(a) of the said agreement.

[11] The plaintiff has issued two other invoices pursuant to cll 2(b)(i) and (ii) for the sum of RM750,000 and RM674,687 on 15 August 2018 and on 26 October 2018 respectively, which the defendant also went on to pay.

[12] The defendant now claims that the said agreement is illegal for contravening public policy and sought restitution for the sums of RM1m, RM750,000 and RM674,687 respectively, which comes to the total of RM2,424,687 the total sum the defendant had paid the plaintiff.

[13] To avoid confusion, for the purpose of this counterclaim, the court referred the plaintiff's witnesses as DW1 and DW2 whereas the defendant's witness as PW1.

COURT ANALYSIS AND FINDINGS

Issues

[14] The defendant has put in four issues for the court to determine. However, based on the evidence presented, the court finds that only two issues need the determination of the court as follows:

A (a) whether the said agreement is illegal as it opposed the public policy and cannot be enforced; and

(b) consequently, whether the sum of RM2,424,687 received by the plaintiff from the defendant in relation to the illegal contract, to be returned to the defendant.

B

Whether the said agreement is illegal as it opposed the public policy and cannot be enforced

C **[15]** In order for the court to determine the issue, the court needs to examine the evidence presented during the trial and the submission made by the parties.

Summary of evidence of witnesses

D Defendant's version

[16] During the trial, Mr Yusof bin Ali (PW1), managing director of the defendant has testified that his company had participated in the tender for the project 'menaiktaraf dan membaik pulih makmal sains at Sekolah Menengah sebagai persediaan peperiksaan' ('the said project') and had successfully bid for the said project from Ministry of Education ('KPM'). His company was previously awarded the project to carry out maintenance works for all the schools at Kulai district by KPM.

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[17] PW1 also informed that the representative of the plaintiff, Madam Nor'Iman (DW2) has informed him that there was tender for the said project by KPM and the said tender also published in the newspaper. PW1 said his employee, Mr Mohamad Khalid who is an engineer, has assisted him to fill up the tender form and prepare the bill of quantities ('BQ') before the defendant submitted the tender to KPM. PW1 denied that DW2 has assisted him in preparing the BQ.

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[18] PW1 has executed the said agreement with the plaintiff on 27 November 2017 (see pp 7–13 of Bundle A1) and the said agreement was prepared by the plaintiff. The plaintiff never sought his view or opinion on the content of the said agreement before the parties executed the said agreement. However, during the cross-examination, PW1 informed that he has negotiated only the terms of payment with the plaintiff. PW1 informed that he has bidden for the said project before he signed the said agreement.

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[19] PW1 informed that under the said agreement, he has paid the plaintiff RM1m through Invoice No 1002/18 on 21 March 2018, the sum of RM750,000 vide Invoice No 1002/18 on 15 August 2018 and the sum of

RM674,687 paid vide the Invoice No 1002/18-B on 26 October 2018. The total sum paid by the defendant's company is RM2,424,687. All the payments were paid in cash to the plaintiff and was paid after he has received the letter of award from KPM.

[20] PW1 explained that he has misconceived and thought he was obliged to pay the plaintiff under the said agreement. He also thought the award of the said project by KPM to his company was what plaintiff promised him under the said agreement. However, after he was summoned by the plaintiff and upon the advice of his counsel, he realized that the said agreement is illegal and not enforceable. It was wrong for the plaintiff to receive payment by using her influence to secure the said agreement from the Minister of Education.

[21] PW1 informed that he has participated the tender and complied with the procedure, requirements and conditions set by KPM. Plaintiff did not contribute nor submit anything pertaining to the tender. PW1 said the plaintiff is not a consultant and does not have any expertise.

[22] PW1 further informed that KPM vide letter of offer dated 13 February 2018 (see pp 34A–34C) offer the tender for the said the project for the sum of RM17,134,455. Subsequently, a letter issued by KPM dated 15 February 2018 (see pp 13–28 of A1) where the sum of the said project has been reduced to RM16,106,387.70. PW1 explained that the difference is due to the Goods and Service Tax ('GST') of 6%. PW1 has attended all the meetings held by KPM when the said project was carried out and DW2 only followed and attended the meetings with KPM at the initial stage. Most of the meetings were held on site and only one or two meetings were held at Putrajaya.

Plaintiff's version

[23] The plaintiff has called two witnesses, Ms Sofia bt Yusof (DW1) and Ms Nor'Iman bt Omar (DW2) to testify.

[24] DW1 informed that she is the owner of the plaintiff's company since 28 September 2017 till 14 January 2019. DW1 further informed that she has represented the plaintiff to enter into the said agreement with PW1, as the representative of the defendant. The purpose of the said agreement was to assist the defendant to secure the said project. The plaintiff has secured the said project through the service provided by the plaintiff to the defendant.

[25] DW1 further informed that the plaintiff has provided various service prior to the said project awarded till one year after the said project being implemented. All the dealings between the defendant and KPM was handled

by the plaintiff. The plaintiff has appointed DW2 as the project manager to assist the plaintiff and the defendant to manage the said project.

[26] DW1 informed that the plaintiff has carried out all the obligations under the said agreement and the plaintiff has received the RM2,424,687 from the defendant. The first payment of RM500,000 was received upon the letter of offer for the said project was issued and the another RM500,000 was paid within 30 days from the first payment. The subsequent payment was made on 15 August 2018 for the sum of RM750,000 and the fourth payment was made on 26 October 2018 for the sum of RM674,687. There was balance of RM35,084 from the third payment and the balance of RM110,397 from the fourth payment. Both payments were not paid by the defendant.

[27] The plaintiff has instructed her former solicitor to send notice of demand to the defendant to demand the balance payment and then filed the case in the Kuala Lumpur Sessions Court. DW1 informed the said agreement is valid and if there is element of corruption or if it is opposed the public policy, she will report the case to the Anti-Corruption Commission or to KPM and the Government of Malaysia. The defendant never dispute the validity of the said agreement.

[28] DW1 informed that the plaintiff received 15% of the contract sum awarded by KPM as the considerations for the service rendered by the plaintiff. When DW1 was questioned by the defendant's counsel, she informed that the service provided by the plaintiff was to secure the said agreement from KPM, prepared BQ, visit all the schools and dealings with the State Education Department ('Jabatan Pendidikan Negeri/JPN'). However, when DW1 was referred to the recital of the said agreement by the defendant's counsel, DW1 agreed that the only obligation of the plaintiff under the said agreement was to secure the said project from the Minister of Education. There is no obligation on the plaintiff to prepare BQ, to visit all the schools at Johor and to deal with the officers of JPN. DW1 agreed that under cl 5 of the said agreement, the defendant is not liable to pay the plaintiff if the plaintiff is unable to secure the said project from the Minister of Education.

[29] DW1 informed the Minister of Education at that time was Dato' Mahdzir Khalid and she did not know the said Minister. DW1 when asked to explain on how the plaintiff secure the said agreement when the plaintiff did not know the said Minister, DW1 said the said agreement was to secure the said project from KPM and not from the Minister of Education. She further explained the plaintiff secure the said project through DW2's contact.

[30] During the cross-examination, the plaintiff admits that she does not have any and/or much technical knowledge and/or expertise with regards to

construction or engineering. She works as a religious teacher and admitted that she did not have any qualification in mechanical and engineering as possessed by PW1. In fact, the plaintiff demurred by saying that her representative, one Puan Nor'Iman (DW2) was the one who had the knowledge and expertise.

[31] DW1 denied that the defendant secured the said project through its own effort. DW1 informed that her company only operate for 15 months, from 28 September 2017 till 14 January 2019 and the company only dealt with the said project. The plaintiff never participate in any bidding or tender for construction project throughout the 15 months operation of the company. DW1 could not explain why the title of the said agreement is different from the title of the letter award dated 15 February 2018 (see p 13 of A1), which stated 'Pelaksanaan Projek Ubah Suai dan Naik Taraf (USNT) Serta Perolehan Peralatan/Apparatus Makmal Sains Sekolah Menengah Seluruh Malaysia (Zon Selatan B)'.

[32] DW2 worked as the project manager for the said project. Most of DW2's evidence was merely repetition as to what DW1 has said earlier that:

(a) the plaintiff was assisting the defendant to secure the said project;

(b) the parties have executed the said agreement for that purpose;

(c) the defendant manage to secure the said project vide the services provided by the plaintiff. The service provided by the plaintiff include the initial works prior to the said project awarded till one year after the project being implemented;

(d) all the dealing between the defendant and KPM about the said project were handled by the plaintiff;

(e) the plaintiff has assisted the defendant to fill up the tender forms or documents required for the tender and ensure all the documents are complete and in order;

(f) she and her team had visited the schools at Johor to records the defects at the laboratories;

(g) she has attended all the briefings or meetings organized by KPM together with the defendant's representative;

(h) the plaintiff has carried out all the obligations under the said agreement; and

(i) she has ten years' experience in handling project of KPM.

[33] When DW2 was questioned by the plaintiff's counsel, she said she has informed DW1 regarding the tender of the said project and she was employed by the plaintiff to handle the said project. She was not paid any salary but she

was given incentive and commission for the said project. She was working with the plaintiff from end of October 2017 till May 2019, for the period of 19 months which was the period of implementing the said project.

COURT ANALYSIS AND FINDINGS

[34] In brief, PW1 has testified on behalf of the defendant and admitted that the company caught wind of the Ministry of Education's project from DW2 whereinafter the defendant had submitted their tender for the project based on the information and representation made by the plaintiff. PW1 was subsequently awarded the said project from KPM for the sum of RM16,106,387.70. PW1 informed that the company had made three separate payments altogether amounting to the sum of RM2,424,687 to the plaintiff after received the letter of offer from KPM based on the said agreement.

[35] The plaintiff on the other hand, argued that they have assisted the defendant to secure the said project from KPM. They have not denied receipt the sum of RM2,424,687 from the defendant and argued that the said payment was a consideration for the service provided under the said agreement.

[36] From the evidence gathered from the parties, the court finds that it is not disputed by the parties that the said agreement was executed by the plaintiff and the defendant for the purpose to secure the said project from KPM and/or Minister of Education. The parties have not denied that the sum of RM2,424,687 has been paid to the plaintiff pursuant to the service provided to the defendant under the said agreement. The dispute between the parties is whether the said agreement is illegal as it opposed the public policy as stipulated under para 24(e) of Contract Act 1950 ('Act 136') or it is a consideration for the service render by the plaintiff under the said agreement.

[37] The said agreement provided that the plaintiff will assist the defendant to secure the said project from the Minister of Education. The material provision is reproduced below from the said agreement:

> WHEREAS:
>
> 1. The Second Party is desirous in assisting the First Party in securing from Minister of Education ('MOE') a contract to 'Menaiktaraf dan membaikpulih makmal sains Sekolah Menengah sebagai persediaan perlaksanaan peperiksaan amali sains untuk calon peperiksaan SPM Sekolah-Sekolah Kementerian Pendidikan Malaysia' at Johor Darul Takzim.

[38] DW1 admitted during cross-examination that the sole purpose of the said agreement is to secure the said project from KPM and not Minister of

Education. The said agreement did not request the plaintiff, inter alia, to visit the laboratories of all schools at Johor and to records all the defects at the laboratories.

[39] The court refers to the DW1's witness statement in particular Q&A no seven where DW1 said that all correspondences between the defendant and the Ministry of Education regarding the said project was handled by the plaintiff. DW1 testified that the plaintiff corresponded with representatives from the JPN and with KPM. DW1 admitted that she did not know the Minister of Education.

[40] Based on the information provided by the plaintiff, the defendant has participated the tender and finally the defendant was awarded with the said project. This made the defendant believed that the company was awarded the said project due to effort made by the plaintiff. He then made the payment based on the said agreement.

[41] The counsel for the plaintiff contends that the burden of proof lies on the defendant to prove that the said agreement is illegal, and referred to the s 103 of the Evidence Act 1950 ('Act 56') as below:

> 101 Burden of proof
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> ...
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> 102 On whom burden of proof lies
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> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 103 Burden of proof as to particular fact
>
> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*. (Emphasis added.)

[42] The counsel for the plaintiff further contends that the burden lies on the defendant to prove, on a balance of probabilities, that there was no consideration furnished by the plaintiff under the said agreement and also to prove their allegations that the said agreement is invalid and/or void and/or illegal for being opposed to public policy.

[43] The plaintiff's counsel submitted that the plaintiff's witness, DW2 has carried out various works to assist the defendant to secure the project, including to assist the defendant to fill up the tender forms, to ensure the documents were complete and in order, and also to visit the laboratory in the Johor schools and to record all the defects in the laboratory so she could prepare the BQ. The

plaintiff further submitted that the evidence of DW2 was not challenged and the defendant has admitted that DW2 did attend the meetings with KPM at the initial stage.

[44] The plaintiff's counsel further contend that based on the services provided by the plaintiff, the defendant has been awarded for the said project and enriched himself from the said project. Therefore, the plaintiff's counsel submitted that the plaintiff had provided and completed its services to the defendant in securing the said project and thus is justified in receiving payment for its services under the said agreement.

[45] The plaintiff's counsel submitted that the payment made by the defendant was for the consultant fees as described in the payment voucher of the defendant. This evidence is against the defendant's pleadings and the statement of PW1 that no consideration given by the plaintiff and the plaintiff was not consultant for the said project.

[46] Further, the plaintiff's counsel submitted the payment of RM2,424,687 by way of cash and made in stages until approximately eight months after receiving the letter of award and during the implementation of the said project, showed that the defendant was satisfied that the plaintiff has provided the service or has performed its obligations under the said agreement. The service was to provide information to the defendant regarding the open tender for the said project. This fact has been admitted by the defendant.

[47] The plaintiff's counsel contends that PW1 was fully aware that the said project was awarded by KPM vide tender and not the Minister of Education. The defendant has made the payment to the plaintiff based on the said award and the said agreement. Therefore, there is considerations for the service provided by the plaintiff and hence the defendant has failed to prove its case under ss 101, 102, 103 of the Evidence Act 1950.

[48] Further, the plaintiff counsel contends that the said agreement is valid based on the following reasons:

(a) DW1 has admitted that he has entered into the said agreement with the plaintiff voluntarily and without any force; and

(b) DW1 has negotiated the terms of payment with the plaintiff.

[49] Therefore, based on the case of *Subramaniam v Retnam* [1966] 1 MLJ 172, the said agreement is valid and enforceable against the defendant.

[50] The court finds that the plaintiff's argument devoid of merits. The evidence from DW1 and DW2 proven DW1 does not have any technical

expertise or any qualification in mechanical and engineering as possessed by PW1 and was admitted by DW1 during cross-examination. DW1 informed that Puan Nor'Iman (DW2) was the one who had the knowledge and expertise. However, the plaintiff was not providing even an iota of technical expertise and the company was never involve in any other project except the said project. Below is the evidence of DW1 and DW2 under cross-examination:

(a) pp 69–71 notes of proceedings:

> Defendant's counsel: *Adakah Puan setuju dengan saya bahawa tanggungjawab Puan di bawah perjanjian ini cuma satu sahaja iaitu mendapatkan kontrak dari Menteri Pendidikan. Kontrak itu adalah untuk menaiktaraf dan membaik pulih makmal sains sekolah menengah di Johor*? Setuju atau tidak? Boleh dapat jawapan daripada Puan? Itu tanggungjawab tunggal Puan di bawah perjanjian.
>
> DW1: *Setuju*.
>
> Defendant's counsel: Di bawah perjanjian sama ini, Puan tidak perlu, tidak dipertanggungjawabkan untuk menyediakan BQ, betul?
>
> DW1: Betul.
>
> Defendant's counsel: Puan juga tidak perlu melawat makmal-makmal sekolah-sekolah di Johar, betul?
>
> DW1: Betul.
>
> Defendant's counsel: Puan juga tidak perlu mencatat kerosakan-kerosakan sama ada di makmal-makmal atau sekolah-sekolah di Johar, betul?
>
> DW1: Betul.
>
> Defendant's counsel: Puan tidak perlu berurusan dengan wakil Jabatan Pendidikan Negeri Johar, betul?
>
> DW1: Betul.
>
> Judge: Ada atau tidak dalam perjanjian ini ada sebut tak tanggungjawab kamu untuk berurusan dengan KPM?
>
> DW1: Tiada.
>
> Judge: Tiada.
>
> Defendant's counsel: Bagi pihak Warisan. Jadi, saya tanya kamu, adakah kamu setuju yang kamu tak ada kepakaran yang tidak dimiliki oleh Defendan? Setuju tak?
>
> DW1: Setuju
>
> Defendant's counsel: Now, saya nak rujuk puan kepada kenyataan saksi puan, ya. Tengok soalan 5. Saya bacakan soalan 5, ya. 'Sila beritahu Mahkamah apakah tujuan perjanjian tersebut dimasuki oleh Warisan Prestasi Resources dan PV Power Engineering?' Jawapan puan, pihak-pihak memasuki perjanjian tersebut untuk Warisan Prestasi Resources memberikan khidmat

atau servis dalam membantu PV Power Engineering mendapatkan tender. Puan faham tak maksud tender ini apa?

DW1: Projek.

Defendant's counsel: Bukankah tender itu merujuk kepada satu set borang?

DW1: Tidak pasti.

Defendant's counsel: Just to check my notes. *Puan, saya nak tahu, adakah Plaintif pernah sepanjang 15 bulan yang ia beroperasi,adakah ia pernah membuat sebarang bida atau masukkan sebarang tender untuk kontrak pembinaan, projek pembinaan*?

DW1: Tidak.

Defendant's counsel: Saya nak pastikan satu lagi. Perjanjian yang kamu masuk dengan Defendan ini pada bulan November 2017?

DW1: Ya.

Defendant's counsel: Kamu masuk perjanjian ini selepas tender dah masuk, kan? Setelah Defendan masukkan tender, betul?

DW1: Tidak pasti.

(b) pp 78–79 notes of proceedings:

Defendant counsel: Now, dalam kenyataan saksi kamu, kamu describe pekerjaan kamu sebagai guru KAFA. KAFA ini apa maksud dia?

DW1: Kelas Asas Fardu Ain.

Judge: Apa?

DW1: Kelas Asas Fardu Ain.

Judge: Kelas Asas Fardu Ain.

Defendant counsel: Guru sekolah agamalah, ya? Betul ke?

DW1: Betul.

Defendant counsel: Dalam kenyataan saksi kamu, ada kamu sebut atau huraikan kelayakan kamu dalam bidang pembinaan?

DW1: Tidak.

Defendant counsel: Bagaimana pula dalam bidang M&E?

DW1: Tidak.

Defendant counsel: Mechanical electrical engineering, tak ada?

DW1: Tidak.

Defendant counsel: Bagaimana pula dalam bidang M&E?

DW1: Tidak.

Defendant counsel: Mechanical electrical engineering, tak ada? **A**

DW1: Tiada.

Defendant counsel: Ada kamu nyatakan dalam kenyataan saksi kamu apa apa kepakaran yang kamu ada? Yang tidak dimiliki oleh Defendan khususnya dalam bidang pembinaan dan M&E? **B**

DW1: Saya tidak memiliki kepakaran dalam bidang itu. Tetapi yang mewakili saya mempunyai kepakaran dalam bidang tersebut.

Defendant counsel: Jadi, kamu setuju dengan saya bahawa kamu tidak mempunyai sebarang kepakaran yang tidak dimiliki oleh Defendan khususnya bidang pembinaan dan M&E? **C**

DW1: Wakil saya mempunyai kepakaran.

Defendant counsel: Saya tanya kamu. Saya tak tanya orang lain. Sebab sekarang ini, perjanjian masuk, perjanjian yang saya tunjuk tadi itu, kamu, kan? **D**

DW1: Betul.

Defendant's counsel: Bagi pihak Warisan. Jadi, saya tanya kamu, adakah kamu setuju yang kamu tak ada kepakaran yang tidak dimiliki oleh Defendan? Setuju tak? **E**

DW1: Setuju.

(c) pp 105–106 notes of proceedings:

Defendant's counsel: Adakah kamu kemukakan sebarang keterangan berhubung pendedahan kamu dalam bidang pembinaan ataupun M&E, mechanical, sorry, mechanical and electrical works? **F**

DW2: Adakah itu bermaksud tentang experience saya? Pengalaman?

Defendant's counsel: Pendedahan, ya, pengalaman.

DW2: Ok. **G**

Defendant's counsel: Kelayakan, ada tulis dalam itu?

DW2: Tidak. Dalam ini tidak tulis.

Defendant's counsel: Ok. **H**

DW2: Tapi ada. Saya ada kelayakan.

Defendant's counsel: 'Dalam kenyataan saksi, saya tak beri keterangan tentang pendedahan saya', ya, dalam bidang pembinaan mahupun M&E, tak ada, ya? **I**

DW2: Tidak. Bukan secara ini, tapi banyak experience buat projek di KPM.

[51] From the evidence of DW1, it is clear that the purpose of the establishment of the plaintiff's company is to secure the said project from

Minister of Education and the said project was the only project handled by the company during the operation of the company for 15 months. The plaintiff knew about the said project through DW2's contact. The plaintiff has represented to PW1 that it is the sale of influence that is the clincher for a government contract and only the plaintiff can deliver it.

[52] Section 24 Act 136 provides that:

> 24 What considerations and objects are lawful, and what not
>
> The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) *the court regards it as immoral, or opposed to public policy*.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. *Every agreement of which the object or consideration is unlawful is void*. (Emphasis added.)

[53] The court agrees with the defendant's counsel contention that the said agreement is illegal and void pursuant to para 24(e) of Act 136 due to the following reasons:

(a) it involved affairs of the government;

(b) it would seem to appear that the plaintiff secured and procured the said contract from the Education Minister and/or Ministry of Education by way of influence-peddling; and

(c) it awarded the plaintiff a hefty percentage of the said contract as a sort of commission as pay-off for purportedly exploiting her personal relationship with the Education Minister.

[54] The said agreement called for influence-peddling on the part of the plaintiff with the Minister of Education as consideration for the parties' bargain. The plaintiff was portraying that the mere submissions of a tender for a government contract was insufficient without the influence of the plaintiff and touting by the plaintiff with the then Minister of Education. The plaintiff has brazenly representing that it is the sale of influence that is the clincher for a government contract and only the plaintiff can deliver it. Hence, it is contrary to the public policy if an individual caused himself to be hired for money and to use his position to secure or procure government contract. Such actions are

inimical to public interest and therefore it is prohibited under para 24(e) of Act 136.

[55] The court further find that by recognizing and accepting the said agreement is injurious to good governance and economically inimical to public interest. In this regard, the court refers to the case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 and opines that this case bears similarities to the present facts.

[56] In *Merong Mahawangsa*, the Government of Malaysia had planned for a bridge to replace the Johore-Singapore causeway ('the bridge project'). The appellants had requested the respondent 'to render his services to procure and secure the award' of the execution of the project from the Government of Malaysia, for which services the appellants had agreed to pay RM20m to the respondent. This was stated in a letter of undertaking from the first appellant to the respondent. The appellants failed to pay under the letter of undertaking and the respondent commenced an action claiming for payment of the RM20m, inter alia, on the grounds that he had rendered the services to the appellants by obtaining the tender and securing the bridge project from the Government of Malaysia. The appellants claimed that procurement of the bridge project on account of the respondent's close relationship with the Government of Malaysia and Dato' Seri Megat Junid was against public policy and that the said letter of undertaking was illegal and void. The appellants also pleaded that the respondent had not secured any project from the Government of Malaysia since the bridge project was subsequently wholly scrapped by the government.

[57] The question of law raised in the Federal Court was:

> Whether an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under s 24(e) of the Contracts Act 1950 ('the Act') and is therefore void?

[58] His Lordships Justice Richard Malanjum, Justice Ahmad Maarop, Justice Jeffrey Tan, Justice Apandi Ali and Justice Abu Samah Nordin unanimously held that:

> [35] Clearly, therefore, *courts are bound at all stages to take notice of illegality*, whether ex facie or which later appears, even though not pleaded, *and to refuse to enforce the contract*. In that regard, we endorse the following statement of law by the Court of Appeal per Hamid Sultan JCA, delivering the judgment of the court, in *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1:
>
> > At the outset we must say that the *trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality*.

...

[69] But with the utmost of respect to both courts, it was entirely wrong to deal with the allegation of illegality by reference to s 2 of the Act. *A contract may be good under s 2 of the Act of the Act but yet bad under s 24 of the Act. It was entirely wrong in law to uphold an illegal contract from the aspect and on the basis of s 2 of the Act*. If it were to be decided under s 2 of the Act, then s 24 of the Act and its purpose to render void the stated unlawful consideration and unlawful objects, would be rendered effete and meaningless, such as if had no use at all.

[70] As said, *whenever the illegality of a contract is raised or become apparent, it is the duty of the court to take it up, by reference to s 24 of the Act*.

...

[74] Section 24 is a codification of the English common law. Therefore, *it is contrary to Malaysian public policy that a person be hired for money or valuable consideration, to use his position and interest to procure a benefit from the Government, as the sale of influence engenders corruption and undermines public confidence in the Government, which is inimical to public interest*.

...

[77] There could be no mistake about it, the RM20m was intended as payment for service rendered by the respondent to secure the bridge project for the Consortium. *But what sort of service was rendered by the respondent? In the instant case, the answer was provided by the respondent. The respondent pleaded that he 'used his influence and good relationship with the Government of Malaysia to procure the original bridge project ('SIG project') for the benefit and interest of the (first appellant)*'. In his amended statement of claim at 164–166 AR, the respondent particularized his close relationship with named Federal Ministers and his dealings with Federal Ministers with respect to the bridge project. But it was not in pleadings alone that influence peddling was admitted by the respondent. In his witness statement (see 564–580 AR), the respondent affirmed his pleaded facts and even provided further details of his influence and the manner in which he exerted his influence and convinced those Federal Ministers (in particular, see 569–571 AR. 'An agreement, the object of which is to use the influence with the ministers of Government to obtain a favourable decision, is destructive of sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy. *It is immaterial, if the persons intended to be influenced are not amenable to such recommendations*' (*Mulla Indian Contract and Specific Relief Acts* (13th Ed Vol 1) at 702–703). *On the facts and on the face of it, it was so plain and obvious that the consideration was unlawful, and that the lett er of undertaking was void. On that ground, the claim should have been dismissed*. (Emphasis added.)

[59] Further, the court refer to the case of *John Ambrose v Peter Anthony & Anor* [2017] 4 MLJ 374 where the first defendant, who is a director of the second defendant, had asked the plaintiff to secure two projects, namely, the Labuan UMS and the KK UMS projects. The defendants would pay the

plaintiff 10% of their total value as commission. The defendants would also pay the plaintiff RM20,000 per month until the projects' completion. The plaintiff successfully secured both projects. In 2010, the parties agreed to vary the commission payable, partly by transferring a house to the plaintiff in lieu of RM500,000. But as the house transfer was not carried out and payment was not made, the plaintiff sued for a declaration of ownership of that house and for satisfaction of the balance 10% commission. The defendants counterclaimed for recovery of possession of that house. The High Court dismissed the claim and allowed the counterclaim. The plaintiff appealed.

[60] The Court of Appeal dismissed the appeal. The Court of Appeal held that it is unnecessary for the exact words 'used position and influence' to emerge in the evidence. A consideration will still be held unlawful for being opposed to public policy under s 24(e) of Act 136 even if the plaintiff did not say he used his influence with the government.

[61] Another pertinent example of a contract opposed to public policy is where a claimant acts as an introducer to broker deals with the govt. In this situation, according to the Court of Appeal in *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1, the claimant does not provide any technical knowledge or skill that a defendant does not already possess. The claimant, in addition, has no official role in the government. Instead, he earns a commission by peddling his skills. It is the bounden duty of the courts to ensure that touts for government contracts are not rewarded.

[62] The Federal Court in the case of *Yogananthy a/p AS Thambaiya v Harta Pusaka Idris bin Osman* [2020] 5 MLJ 455; [2020] 6 CLJ 151 described the factual matrix in *Merong Mahawangsa* as an example of an overt dishonesty element that shall always attract public policy, where the upholding of the bargain would be tantamount to encouraging dishonesty.

[63] In the present case, DW1 has admitted that the plaintiff has the information about the said project through DW2's contact. The sale of the influence by the plaintiff by using the name of the Minister of Education have convinced the defendant that they could secure the said project from the Minister of Education. However, DW1 has admitted that she did not know the Minister of Education and tried to explain that the said project was awarded by KPM and not the Minister of Education.

[64] Further, DW1 informed that the plaintiff was responsible to prepare the said agreement and they never sought the opinion of PW1 regarding the said agreement. PW1 informed that he was only negotiated the terms of the payment. The court finds this explanation could not justify and change the fact

as the said agreement stated it was to secure the said project from the Minister and not from KPM. The plaintiff is not allowed to depart from their own pleadings.

[65] The court is of the view that the plaintiff has been using their influence and insider information provided by DW2's contact in order to assist the defendant to secure the said project. This is admitted by DW1 and DW2. Applying the principle enunciated in the case *Merong Mahawangsa*, the influence peddling by the plaintiff is contrary to public policy as the plaintiff is to be hired for money to secure the said project from KPM for a benefit. The sale of influence engenders corruption and undermine public confidence in the government. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy and a contractual consideration is inimical to public interest.

Whether the sum of RM2,424,687 received by the plaintiff from the defendant in relation to the illegal contract, to be returned to the defendant

[66] The next question to be determined by the court is whether the defendant is entitled to claim the sum of RM2,424,687 from the plaintiff. The counsel for the defendant submitted that the defendant is entitled to restitution pursuant to an illegal contract which is void ab initio.

[67] The parties never dispute that 15% of the said contract sum was intended as payment for service rendered by the plaintiff to secure a contract from the Education Minister and/or Ministry of Education to be awarded to the defendant.

[68] The plaintiff's counsel argued that since there the element of 'consideration' on the part of the plaintiff to assist the defendant in securing the project, the element of 'consideration' on the part of the defendant was to pay 15% of the contract sum to the plaintiff. In supporting her contentions, the counsel of the plaintiff referred to para 2(d) of Act 136 which provides that:

> 2(d) when, *at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise*. (Emphasis added.)

[69] This issue however, has been well settled in the case of *Merong Mahawangsa*. Per Jeffrey Tan FCJ at p 652:

> [69] But with the utmost of respect to both courts, it was entirely wrong to deal with the allegation of illegality by reference to s 2 of the Act. *A contract may be good under*

s 2 of the Act of the Act but yet bad under s 24 of the Act. It was entirely wrong in law to uphold an illegal contract from the aspect and on the basis of s 2 of the Act. If it were to be decided under s 2 of the Act, then s 24 of the Act and its purpose to render void the stated unlawful consideration and unlawful objects, would be rendered effete and meaningless, such as if had no use at all.

...

[70] As said, *whenever the illegality of a contract is raised or become apparent, it is the duty of the court to take it up, by reference to s 24 of the Act. In Wong Hon Leong, the allegation of illegality should have been considered by reference to s 24(e) of the Act and the pertinent case law*. But unfortunately, not a single authority on illegality on the ground of public policy was considered in *Wong Hon Leong*. Instead, only *Lampleigh*, an authority on past consideration in assumpsit that was decided just immediately after the Middle Ages, was relied on to rule against illegality. With respect, the common law of England has so developed that it would rule against the sort of service provided by *Lampleigh* for a fee.

...

[74] Section 24 is a codification of the English common law. Therefore, *it is contrary to Malaysian public policy that a person be hired for money or valuable consideration, to use his position and interest to procure a benefit from the government, as the sale of influence engenders corruption and undermines public confidence in the government, which is inimical to public interest*. It was preposterous to submit that 'when the government officials themselves have no qualms of the widespread practice of awarding contracts or projects to their cronies then surely this practice is acceptable in Malaysia. And hence such agreement to use a person's good contacts and or standing with certain government officials in order procure contracts or projects cannot be against public policy in Malaysia' (see respondent's further written submission dated 15 October 2014 at para 18). (Emphasis added.)

[70] Based on the decision of *Merong Mahawangsa*, it has rebutted the plaintiff's counsel argument and therefore the said argument devoid of merits. Further, it is noted the plaintiff's counsel has argued the said payment is for the consultation fees. This argument was never pleaded nor was it was put this point to PW1 during the cross-examination by the plaintiff's counsel. Court of Appeal in the case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 decided that:

It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and *if a party, in the absence of valid reasons. refrains from doing so. then he may be barred from raising it in argument*. It is quite wrong to think that this rule is confined to the trial of criminal causes. *It applies with equal force in the trial of civil causes as well.*

This rule as to cross-examination to which I have just adverted derives its name from the case in which it was expressed. It is the decision of the House of Lords in *Browne v Dunn* (1893) 6 R 67.

In the same case, Lord Halsbury had this to say (at p 76):

> ... *To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation*. (Emphasis added.)

[71] Therefore, the failure of the plaintiff's counsel to cross-examine PW1 on the payment voucher issued by the defendant is detrimental to the plaintiff's case and thus, the plaintiff's counsel is precluded from raising in her arguments. This has been expressed in the Singapore High Court in the case of *Hong Leong Singapore Finance v United Overseas Bank* [2007] 1 SLR (R) 292 at p 157 as follows:

> ... [W]here a submission is going to be made about a witness or the evidence given by the witness which is of such a nature and of such importance that it ought fairly to have been put to the witness to give him the opportunity to meet that submission, to counter it or to explain himself, then *if it has not been so put, the party concerned will not be allowed to make that submission*. (Emphasis added.)

[72] The defendant's counsel submitted that as displaying a quintessential consideration that is ex facie unlawful, as it showcases a tendency to corrupt public servants, namely, to inveigle them to award government contracts otherwise than on merit. This is regardless of whether or not the minister concerned accommodated or was amenable to the recommendation by the influence-peddler. The stigma or taint attaches when the influence-peddling act is contemplated in a contract.

[73] Hence, the defendant is entitled to restitution of the RM2,424,687 as it is opposed the public policy and hence the said agreement will void ab initio. Following the decision of *Patel v Mirza* [2017] AC 467, the defendant is entitled to the return of the said sum. The said decision has been approved by Court of Appeal in the case of *Pang Mun Chung & Anor v Cheong Huey Charn* [2018] 4 MLJ 594; [2018] 8 CLJ 663 and Federal Court in the case of *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141; [2019] 1 CLJ 183.

[74] Applying the principles laid down in the cases above, the defendant's counsel submitted that:

(a) as decided by Federal Court in the case of *Merong Mahawangsa*, it is contrary to public policy for an individual to be hired for money to secure a benefit from the government, the sale of influence engenders corruption and undermine public confidence in the government. Such a contractual consideration is inimical to public interest;

(b) a denial of the defendant's restitution counterclaim would not enhance the purpose of prohibiting the sale of influence within the realm of government based on the following reasons:

(i) the defendant has not been alleged to have been aware of the illegality. Plaintiff, in fact, sent a lawyer to receive the RM2.4m from the defendant (see pp 13–14 of encl 264);

(ii) PW1 testified that he was not aware of the said agreement is illegal;

(iii) the decision of *Merong Mahawangsa* is in favour of the claimants such as the defendant in this case; and

(iv) DW1 was hawking her influence peddling skills and she was touting for the said project;

(c) the plaintiff's conduct was injurious to common welfare, it would be in the interest of public good that the defendant be granted restitution for all the monies that has paid to the plaintiff, monies that the defendant rightfully and lawfully received from the government for the works he did in having completed the said project; and

(d) the defendant was seeking to unwind the unlawful consideration.

[75] Alternatively, the defendant's claim for restitution based on unjust enrichment. The plaintiff has been enriched by receiving RM2.4m from the defendant at the expense of defendant which in turn came from the Government under the KPM contract. The retention is unjust as the plaintiff admitted that she does not know the Minster of Education and she does not have any expertise that PW1 possesses. The plaintiff does not have any defence to resist the defendant's counterclaim. The defendant's counsel has referred to the case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 to support his contention.

[76] The defendant's counsel further argue that the defendant is entitled to recover RM2.4m pursuant to s 66 of Act 136. The defendant's counsel has cited the cases of *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 MLJ 141, *Ahmad bin Udoh & Anor v Ng Aik Chong* [1970] 1 MLJ 82 and *Soh Eng Keng v Lim Chin Wah* [1979] 2 MLJ 91 to support his arguments.

[77] The defendant's counsel also argues since the plaintiff has not caused the award of the contract by the Minister of Education to the defendant and hence the plaintiff is not entitled to payment and a fortiori she must then return RM2.4m that she has undeservedly pocketed from the defendant. The defendant's counsel referred to the case of *Wong Yee Boon v Gainvest Builders*

(M) Sdn Bhd [2020] 3 MLJ 571 and *Rowland v Divall* [1923] 2 KB 500 to support his contention.

[78] In this regard, the court draw guidance from the UK Supreme Court case of *Patel v Mirza*, where the following passage was stated by Lord Neuberger:

> [145] *The present appeal concerns a claim for the return of money paid by the claimant to the defendant pursuant to a contract to carry out an illegal activity, and the illegal activity is not in the event proceeded with owing to matters beyond the control of either party*.
>
> The specific issue on this appeal
>
> [146] In such a case, *the general rule should in my view be that the claimant is entitled to the return of the money which he has paid*. In the first place, such a rule ('the Rule') is consistent with the law as laid down in the 18th Century by two eminent judges, one of whom is regarded as the founder of many aspects of the common law, including illegality; in addition it has support from some more modern cases. Secondly, the Rule appears to me to accord with policy, which is particularly important when illegality arises in the context of a civil claim. Thirdly, the Rule renders the outcome in cases in one area of a very difficult topic, that of contracts involving illegality, and the maxim *ex turpi causa non oritur actio* (ie that no claim can be based on an illegal or immoral arrangement), relatively clear and certain. (Emphasis added.)

[79] UKSC has unanimously dismissed Mr Mirza's appeal, but the judges were divided as to the reasoning. The majority were led by Lord Toulson, who went on to share the following:

> [82] In his *Restatement of the English Law of Contract* (2016), pp 221–222, Professor Andrew Burrows explained the difficulty of attempting to state the law in relation to illegality:
>
> > Leaving aside the law on what one can loosely label 'statutory illegality' [cases where a statute makes a contract or a contract term unenforceable by either or one party] the law on the effect of illegality in contract (which one may loosely refer to as 'the common law of illegality') is in a state of flux ...
>
> ...
>
> [93] If a 'range of factors' approach were preferred, Professor Burrows suggested, at pp 229–230, that a possible formulation would read as follows:
>
> > *If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), the contract is unenforceable by one or either party if to deny enforcement would be an appropriate response to that conduct*, taking into account where relevant — (a) how seriously illegal or contrary to public policy the conduct was; (b) whether the party seeking enforcement knew of, or intended, the conduct; (c) how central to the contract or its performance the conduct was; (d) how serious a sanction the

denial of enforcement is for the party seeking enforcement; (e) whether denying enforcement will further the purpose of the rule which the conduct has infringed; (f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy; (g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct; (h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.

Professor Burrows noted that the final factor is capable of a wider or narrower approach, depending on what one understands by inconsistency.

...

[120] *The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case)*. In assessing whether the public interest would be harmed in that way, it is necessary:

(a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;

(b) to consider any other relevant public policy on which the denial of the claim may have an impact; and

(c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. *The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate*. (Emphasis added.)

[80] In the present instance, the court has considered the above criteria, and given the reasonings accordingly:

(a) *to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim*:

The case of *Merong Mahawangsa* clearly stated that 'it is contrary to Malaysian public policy that a person be hired for money or valuable consideration, to use his position and interest to procure a benefit from the Government, as the sale of influence engenders corruption and undermines public confidence in the Government, which is inimical to public interest ...'. The court is of the view that the defendant will be severely prejudiced should his claim for restitution be denied;

(b) *to consider any other relevant public policy on which the denial of the claim*

may have an impact:

The court finds that it would only be in the public's good interest that the defendant be granted restitution of the monies it had paid the plaintiff unknowing at that point of time that the said agreement which the plaintiff was relying on, was illegal in nature, monies that the defendant received for work done in completing the project; and

(c) *to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts*:

The court finds that denial of the claim would be a disproportionate response to the illegality at hand and upholding of the bargain would be tantamount to encouraging dishonesty.

[81] On the facts and on the face of it, it is plain and obvious that the consideration was unlawful, and that the said agreement entered by the parties is opposed public policy under para s 24(e) of Act 136 and therefore the said agreement was void. The plaintiff's claim should have been dismissed on that ground alone.

CONCLUSION

[82] On the totality of the evidence presented, the defendant had proved their counterclaim on a balance of probabilities. In fact, it was plain and obvious that the consideration was unlawful, and the said agreement between both parties was thus void ab initio.

[83] The court agrees with the defendant that the plaintiff had been unjustly enriched. Therefore, the defendant is entitled to restitution.

[84] In the upshot, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, both oral and documentary, and submissions of counsel for both parties, I allowed the defendant's counterclaim as follows:

(a) the written agreement between the plaintiff and the defendant dated 21 November 2017 is invalid and/or void and/or illegal for being opposed to public policy and cannot be enforced;

(b) for the sum of RM2,424,687 which the plaintiff had before this received from the defendant in relation to the illegal contract, to be returned to the defendant within 30 days from the date of the judgment dated 7 May 2023;

(c) interest at 5% pa to accrue on the said amount of RM2,424,687 until full settlement of the debt; and

(d) costs of RM5,000 subjected to allocator fee, to be paid by plaintiff to the defendant.

Order accordingly.

Reported by Ashok Kumar